IN THE

Supreme Court of the United States

October Term, 1963

No. 775

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, et al.,

Petitioners

v.

EDDIE WITTSTEIN, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

The Industrial Union Department, AFL-CIO, files this brief *amicus curiae* in support of the petition for certiorari, in accordance with Rule 42 of the Rules of this Court. The consent of the attorneys for all parties has been obtained.

STATEMENT OF INTEREST

The Industrial Union Department (IUD), as its name implies, is that department of the American Federation of Labor and Congress of Industrial Organizations which represents unions organized wholly or partially on an industrial basis. Some 59 unions, with approximately 6 million mem-

dues increase upset in court as the one in this case was. No union can afford that risk.[2]

Therefore, unless the decision below is promptly reversed, most unions will be compelled to accept it as law and amend their constitutions accordingly. But this course presents equally difficult problems. Is the appropriate solution simply to amend the system of voting on dues increases, otherwise leaving the existing system of convention voting intact? If this approach is taken, a highly incongruous situation is created, in which all other convention action is taken by a system of representative voting, while dues increases are passed upon by the distinctly unrepresentative system of one vote per delegate. In a union like the American Federation of Musicians, where locals vary tremendously in size but are permitted no more than 3 delegates, such a system is so highly arbitrary that it probably could not get sufficient support to be adopted. And in any event, this Court should surely not allow a decision to stand unreviewed which is as questionable as this one is, and which will force many unions to adopt a highly undemocratic system of voting on dues matters.

The alternative way for a union to comply with the decision below is to revise the entire structure of its convention, by providing for a representative number of delegates from each local union who would cast only one

[2] The risk would be especially great for the substantial group of unions whose constitutions run from convention to convention. These unions adopt an entire new constitution at each convention. Suppose such a union, by its system of weighed voting, adopts a new constitution calling for higher dues than existed under the preceding one. If a court were to set that action aside as an unlawful dues *increase*, it could be argued that not only the increase but the entire dues provision of the constitution might thereby be nullified. Since the pre-existing provision expired with the old constitution, the argument could be made that the union in such a situation has no valid dues provision at all.

vote each on all matters, including dues increases. This approach also presents practical problems. In many unions, locals vary greatly in size. Thus, the larger locals would have to send a veritable army of delegates in order to be fairly represented. This creates a tremendous financial burden for the locals, as well as a physical problem for the convention itself. These practical considerations would in many cases make this approach simply infeasible.

The above problems, we wish to emphasize, are immediately presented by the decision below whether or not the union anticipates an immediate need for a dues increase. In order to put itself in a position to increase dues should the need arise in the future, a union must provide itself with the machinery for doing so. Indeed, if a union attempts to meet the problem by changing the number of delegates its local unions may send to conventions, it must amend its constitution at a convention in advance of the convention at which the dues question is considered.

Any union which wishes to present a dues increase proposal for action at its next convention is confronted by an even greater problem. If the union's constitution provides for weighted voting, it knows that it cannot follow that procedure without running afoul of the decision in the present case. But what procedure should it follow? If it simply counts the votes of its delegates equally, it runs the substantial risk of being sued for failing to follow its constitutional procedure! And even assuming that the decision below would furnish a justification for voting by a procedure not authorized by the constitution, what happens if that decision is subsequently reversed? The only safe procedure would seem to require two conventions. The first convention would amend the constitution to provide either a new procedure for voting on dues increases or a whole new system of convention representation. Then a new convention would be summoned, with such additional delegates as might be nec-

Union	Membership	Voting System
Retail, Wholesale and Department Store Union	111,000	M
American Federation of Government Employees	97,000	M
Transport Workers Union of America	80,000	DP
American Bakery and Confectionery Workers International Union	71,000	DP
International Chemical Workers Union	68,000	T
Allied Industrial Workers of America	63,000	T
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada	50,000	DP
Upholsterers International Union[b]	50,000	M
Utility Workers Union of America	50,000	M
United Shoe Workers of America	48,000	DP
International Union of Brewery, Flour, Cereal, Soft Drink and Distillery Workers	45,000	M
International Brotherhood of Firemen and Oilers	45,000	DP
United Furniture Workers of America	32,000	M
American Flint Glass Workers Union	29,000	T
Industrial Union of Marine and Shipbuilding Workers of America	28,000	DP
American Federation of Grain Millers	24,000	DP
American Newspaper Guild	23,000	T
The United Brick and Clay Workers of America	21,000	DP
Insurance Workers International Union	21,000	T
United Stone and Allied Products Workers of America	11,000	DP
Stove, Furnace and Allied Appliance Workers of North America	9,000	DP
National Association of Broadcast Employees and Technicians	4,000	M

[b] The Upholsterers International Union raises initiation fees, but not periodic dues, at Convention. The provisions of Section 101(a)(3), however, apply equally to initiation fees and periodic dues.

BRIEF FOR THE RESPONDENT IN OPPOSITION

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 19 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802,

Petitioners,

against

EDDIE WITTSTEIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

GODFREY P. SCHMIDT,
Attorney for Respondents,
60 East 42nd Street,
New York, N. Y. 10017

INDEX.

	PAGE
Statute and Union Regulations Involved	1
Questions Presented	3
Counter-statement of the Facts	5
ARGUMENT:	
POINT I.—In answer to Judge Marshall's dissent and to the Petition	11
I. Critique of Judge Marshall's Dissenting Opinion	11
II. Critique of Petitioners' reasons for granting the writ, insofar as those reasons have not already been dealt with in this Brief by way of the foregoing critique of Judge Marshall's dissenting opinion	27
POINT II.—The Sixty-Sixth Annual AFM Convention increased Union dues and initiation fees in violation of Section 101(a)(3), Title I, of LMRDA	33
POINT III.—AFM officers in conducting the evening session which enacted Recommendation No. 11 violated their fiduciary responsibilities under Section 501(a) of the LMRDA, by disregard of the AFM Constitution and By-laws and by the manner in which they railroaded the Recommendation through the Convention. This appears from the "*Official Proceedings*" of the Convention. Therefore the result effected by the decision on appeal is just and valid, even if Petitioners' interpretation of Section 101(a)(3) of the Act were correct	36
CONCLUSION	42
Appendix	43

Table of Cases.

	PAGE
Brooks v. *Local 30*, 187 F. Supp. 365	37
Carroll v. *A. F. M.*, 295 F. 2d 484	6
Cunningham v. *English*, 269 F. 2d 517	14
Cutler v. *A. F. M.*, 316 F. 2d 546 Cert. denied December 9, 1963	6, 39
Holdeman v. *Sheldon*, 204 F. Supp. 890, affirmed 311 F. 2d 2	36, 37
Langnes v. *Green*, 282 U. S. 531	36
Nelson v. *Johnson*, 212 F. Supp. 283, affirmed F. 2d	37
United States v. *Ballard*, 322 U. S. 78	36
Walling v. *General Industries Co.*, 330 U. S. 545	36

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 775.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802,

Petitioners,

against

EDDIE WITTSTEIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Statute and Union Regulations Involved.

This case involves Title I, Sections 101(a)(1)(2), and USC §411(a)(1) and Section 101(a)(3), 29 USC §411(a)(3) of Title I of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 *et seq.*, 29 USC §401 *et seq.* (hereinafter called LMRDA)

The case also involves Title V, Section 501, 29 USC §711 (reproduced in the Appendix to this Brief).

The relevant *union* "law" is fully quoted in the Opinion of the United States District Court for the Southern District of New York (126A-130A).*

The Complaint (26a-41a) seeks a declaratory judgment nullifying as illegal the *entire* "RECOMMENDATION No. 11" (40a-41a). That RECOMMENDATION was a proposed resolution eventually enacted as AFM "law" by the "Sixty-Sixth Annual Convention" of the AFM held June 10-15, 1963 at Miami Beach, Florida. On *Petitioners'* motions for summary judgment, the District Court granted to *Respondents*, (who had not moved for it) *partial* summary judgment (2a). The original judgment appears (under an erroneous title) at 143a-144a; but that judgment was, on consent of the parties, revised (Petition, p. 7, footnote 7). That revision is here quoted, since it does not appear in the Petition:

> Defendant having moved this Court for an order modifying and clarifying the Judgment dated October 30, 1963, heretofore entered in this action; this Court having heard the arguments of counsel and having been fully advised, it is
>
> ORDERED that the first and second decretal paragraphs of the Judgment entered in this action on October 30, 1963 be modified so as to provide:
>
> "ORDERED, ADJUDGED, DECREED AND DECLARED that Items Nos. 3 and 4 of Recommendation No. 11 passed at the 1963 Annual Convention of the American Federation of Musicians of the United States

* The Appendix to Appellants' Brief in the Court below (white-covered book) is referred to by numerals immediately followed by the letter "A" and enclosed in parentheses; pages of the Appendix to Appellees' Brief in the Court below appear as numerals followed immediately by the letter "B" and enclosed in parentheses; and pages of the "OFFICIAL PROCEEDINGS" of the Sixty-Sixth Annual Convention printed by American Federation of Musicians of the United States and Canada are referred to as "Proc." followed by a numeral indicating the page of the printed proceedings.

and Canada, insofar as they increase the dues and initiation fees of its members, were invalidly enacted under Section 101 (a) (3) (B) (i) of the Labor-Management Reporting & Disclosure Act of 1959, 29 U. S. C. §411 (a) (3) (i); and it is further

"ORDERED, ADJUDGED, DECREED AND DECLARED that Item 2(a) of Recommendation No. 11 shall not be construed to authorize an increase of union dues payable by members without compliance with Section 101 (a) (3) of the Labor-Management Reporting & Disclosure Act of 1959, 29 U. S. C. §411 (a) (3)."

Thus, the case against the remaining illegal features of RECOMMENDATION No. 11 remains to be tried in the District Court, where it is still pending, and this appeal concerns only the *partial* summary judgment just quoted.

Questions Presented.

1. Was Petitioners' voting procedure which enacted RECOMMENDATION No. 11, at the Sixty-Sixth AFM Convention violative of Section 101(a)(3) of the LMRDA to the extent that it increased union dues and initiation fees?

2. Is Article 5 of the AFM Constitution, under which a "roll-call vote" purported to enact RECOMMENDATION No. 11, consistent with the LMRDA (especially Section 101(a)(3) thereof) since Article 5 does not vest full control over dues increases in members or their delegates?

3. Does the record before the Courts below demonstrate that Section 501(a) of LMRDA was so violated as to nullify RECOMMENDATION No. 11 entirely (and that the Courts below had pendent jurisdiction of such violation) because Petitioners' officers breached their trust in relation to the AFM and its members as a group by

(a) "railroading" RECOMMENDATION No. 11 through the said convention (Proc. 55-63; 114a-120a; 74a-104a);

(b) disobeying material and relevant provisions of Petitioners' Constitution and By-Laws;

(c) suppressing, before and during said convention, vital information needed by the delegates, members and Locals for intelligent consideration of so important a measure as RECOMMENDATION No. 11 and the problem it presupposed (29a-30a; 55a-56a; 74a-83a);

(d) misleading and misinforming the members, Locals and delegates respecting the problem with which the Recommendation purports to cope (74a-83a; 29a-30a; 55a-56a);

(e) limiting debate and discussion on RECOMMENDATION No. 11 at said Convention to 15 delegates, of whom nine were "hand-picked" by AFM President Kenin (who chaired the Convention and favored the Recommendation) to be members of committees which made the convention operate in railroad fashion;

(f) permitting vote splitting and the casting of between 26,000 and 52,000 duplicate ballots during voting on RECOMMENDATION No. 11?

4. Did the "OFFICIAL PROCEEDINGS" of the Convention demonstrate that the Convention procedures which purported to enact RECOMMENDATION No. 11 deprive the delegates at the said Convention of equal rights granted to all union members by Section 101(a)(1) of the LMRDA, thereby invalidating RECOMMENDATION No. 11 entirely?

5. Did the manner of conducting the Convention, as reflected in the "OFFICIAL PROCEEDINGS" thereof, deprive

delegates of freedom of speech and assembly under Section 101(a)(2) of the LMRDA and thus invalidate RECOMMENDATION No. 11 entirely?

Counter Statement of the Facts.

The facts and events here relevant are set forth in some detail in the complaint in 63 Civil 2548 (26a-40a) and more fully in the affidavit of Godfrey P. Schmidt (73a-104a).

At the Sixty-Sixth AFM Convention in Miami Beach, Florida, "RECOMMENDATION No. 11" (Proc. 55-56) was voted at an "Evening Session" between 12:10 A. M. and 2:30 A. M., June 13, 1963 (119a); the session began at about 8:00 P. M. on June 12th (Proc. 53-63; 118a). RECOMMENDATION No. 11, which is an omnibus enactment comprehending about a dozen different, and in some instances unrelated, matters (33a ¶41; 35a ¶47 and 48), increases (a) the "Annual Federation Per Capita Dues" (53a, paragraph 2); (b) "Federation Initiation Fees" (53a, paragraph 3); and (c) "Local regular periodic dues" (54a, paragraph 4). The text of RECOMMENDATION No. 11 had been distributed to the delegates less than six hours before the voting began (93a). No notice or information respecting it or respecting the somewhat similar RECOMMENDATION No. 2 (Proc. 83), had ever been distributed to the delegates, membership or Locals prior to the Convention.

Debate on this "burning question" (Proc. p. 31) was limited to speeches by *fifteen* delegates (Proc. p. 58) out of 1176 (Proc. p. 30), despite the fact that full discussion of the *problem* to which RECOMMENDATION No. 11 was addressed had been promised (80a) and is alleged to have preceded the Convention (80a-89a). Actually the "OFFICIAL PROCEEDINGS" show no discussion whatever of that *problem*.

But discussion of RECOMMENDATION No. 11 was limited to fifteen delegates of whom *nine* were hand-picked by AFM President Kenin (89a-92a).

Appellants were put on notice that they had a *problem* needing solution and that their "laws" needed amendment by complaints filed in the District Court in 1960, by the decision of the Court of Appeals dated October 17, 1961 (*Carroll* v. *A. F. M.*, 295 F. 2d 484), by the District Court's decision of November 2, 1962 (*Cutler* v. *A. F. M.*, 211 F. Supp. 433) and by the Court of Appeals' further decision of April 30, 1963 (*Cutler* v. *A. F. M.* 316 F. 2d 546 Cert. denied December 9, 1963). Nevertheless, Appellants came to the Convention without even a draft of any proposed solution to their problems or of any amended By-laws to bring AFM "laws" into conformity with Federal statute and with authoritative decisions construing it (83a-90a; 94a-95a).

AFM "laws" provide five methods of voting:

1. Article 28, (entitled "CONVENTION PROCEEDINGS") §2. AFM By-laws:

> "For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided and the manner of voting shall be viva voce, unless otherwise ordered."

2. Unweighted votes by Convention delegates, under §21, Article 28 of AFM By-laws:

> "No alterations or amendment to the Constitution or By-laws (expect it is otherwise provided in the By-laws or ordered by a convention) shall be made unless proposed in writing, and said alterations or amendments must receive *a majority vote of the delegates present* to become a law, unless otherwise provided" (emphasis added).

3. The first part of Article 5, AFM Constitution calls for weighted voting by delegates, wherein each Local has from one to ten votes, depending upon the size of the Local's membership (126a).

4. Voting by written ballots is authorized by Article 28, §2, AFM By-laws, as supplemented by Robert's Rules of Order, §46, pp. 193-196.

5. Vote "on roll-call", is provided in the second part of Article 5, AFM Constitution (126a). An AFM official admitted that he had never in nineteen years of attendance at AFM Conventions seen this method used (11b).

AFM belatedly admitted (its "Official Proceedings" do not show this) that there were *two* voice votes (34b-35b) at the Convention. RECOMMENDATION No. 11 failed to pass either of them (30b; 30a "25). No standing or rising vote (as is required in the circumstances by Robert's Rules of Order) was called for by the Chair after it had twice announced that the "Ayes" and the "Nays" were "of equal response" (30b-31b). After the double failure of the "voice vote", an unnamed delegate proposed a vote by written ballot: "I think we should set the machinery in motion tonight or tomorrow morning for a ballot vote. This will give us the only real decision" (115a).

The Chairman (who is an attorney and AFM President: Herman Kenin) immediately misstated this request and answered: "Well, a roll-call vote is what you are referring to. Any ten delegates or five locals may ask for a roll-call vote if you are dissatisfied with the voice vote" (115a).

As if by prearrangement, the Chair immediately recognized Delegate Merle Snider, who instantly called for a roll-call vote (115). Conveniently, Snider said he *had* five locals. This was accepted by the Chair with alacrity as *mandating* a vote on "roll-call" (115a-116a).

In those portions of the *verbatim* minutes (114a-121a) of the Convention revealed by Petitioners, the latter carefully avoided any disclosures which might show the actual proceedings (a) *during the two voice votes* and (b) *during the transition from the voice votes to the proceedings just described* (35b-38b). Petitioners strenuously opposed Respondents' efforts to obtain the tapes or *verbatim* transcriptions of omitted portions of the proceedings (33b-38b; 27b-28b). Respondents contend that the Chair deliberately misrepresented the two voice votes; and that, in fact, the voice votes clearly and loudly rejected RECOMMENDATION No. 11 (98a). Play-back of the tapes (27b) would have shown this.

In any event, the record shows indisputably: that after failures of the voice votes to pass RECOMMENDATION No. 11, no motion to reconsider was offered (33b-36b); that the "roll-call" voting began after 12:10 A. M. on June 13, 1963 (119a); that a delegate asked for a *ballot vote* (115a) which the Chair immediately evaded by misrepresenting it as a call for a "roll-call" vote (115a), as to which the Chair ruled that, if the delegates "are dissatisfied with the voice vote", they could use the "roll-call" vote method (115a); that delegate Merle Snider, in calling for a roll-call vote instantly thereafter, presumed to speak for six Locals, although he was the delegate from only one of the six (115a); that Snider could not possibly have had time (except by pre-arrangement) to consult with delegates of five Locals other than his own in the instant between President Kenin's ruling on the delegate's request for a ballot vote (115a) and Snider's call for a roll-call vote (115a); that the Chair did not ask the delegates from the other five Locals whether, in fact, they had demanded a roll-call vote (115a-116a); that the roll-call voting procedure was

without precedent (116a) or so rare, as the Chair itself admitted (116a), that the latter had to explain it to the delegates (116a); that the "roll-call" voting procedure used by Appellants under Article 5 of the AFM Constitution (Appellants' Brief, p. 5) is quite different from the usual "Vote by Roll Call" ("Yeas and Nays") described by Robert's Rules of Order in §46 pp. 197-198 (Revised Manual) or used by Congress; that the Chair in a bumbling explanation of the "roll-call" authorized the splitting of the membership votes by the delegates (116a; 120a); that the Chair resisted all efforts to postpone the past-midnight vote until the next morning (115a; 117a-118a; 119a); that RECOMMENDATION No. 11 was rushed through in great haste (117a-119a; 89a-93a); that delegates found the conglomerate nature of RECOMMENDATION No. 11 a handicap for the purposes of consideration and voting (115a; 117a-117a); that a minority of the individual delegates voted for RECOMMENDATION No. 11 (Proc. 7-30; 58-63); and that the AFM *members* (as distinguished from their *delegates* at the Convention) had not the faintest knowledge of RECOMMENDATION No. 11 and the midnight debate concerning it at the Convention (93a-98a).

In conducting the "roll-call" vote, Petitioners included at least between 26,000 and 52,000 duplicate votes (33a-34a; 73a-74a; 2b-7b; 12b-22b; 109a); and they authorized and allowed vote-splitting by the delegates (23b; 116a; 120a) according to the sole discretion of the delegates from each represented Local.

The number of delegates attending the Convention was fixed at 1,219 by the Convention's Credentials Committee (7b-10b).

The vote which enacted RECOMMENDATION No. 11 was 158,068⅔ favoring "YES" and 113,742⅓ favoring "No"

(Proc. 63).. Thus, the margin was 44,326⅓. The total number of votes cast by the 22 Locals which had split membership ballots was 15,066 (Proc. 58-63). Exactly how many duplicate votes were cast was not consistently admitted by Petitioners. Scola's first affidavit states: "approximately 26,000 are members of two or more locals" (46a). He confirmed this on the stand (2b-3b):

> "Q. Did you give him [Petitioners' attorney] any information to the effect that there were 26,000 members of the AF of M who belonged to two or more locals? A. Yes.
>
> Q. And this is what you meant when you wrote paragraph numbered three of that affidavit? A. That's right.
>
> * * * * * *
>
> Q. You said that approximately 26,000 members * * * are members of two or more locals; isn't that correct? A. That's correct, sir.
>
> Q. Is that a correct statement? A. That is what I said" (3b).

This would mean, necessarily, that *at least* 52,000 votes were duplicates (33a paragraphs 39 and 40). But Scola's second affidavit (108a-109a) contradicts this. There (109a) he states that "12,381 members of the Federation are members of more than one Local;" and that they involved at least 26,174 duplicate ballots. AFM witness Neri testified (17b) that he could not be sure of the 26,174 figure: "It might come up with more".

The total of the split votes, 15,066, and the sometimes admitted duplicate total of 26,174 amounts to 41,240 which almost wipes out the margin of 44,326⅓ by which RECOMMENDATION No. 11 was passed. If Scola's earlier testimony and affidavit are correct, the duplicate votes exceeded 52,000. Neri's testimony confirms (12b-21b) that the AFM figure of 26,174 is unreliable.

POINT I.

Argument in answer to Judge Marshall's dissent and to the Petition.

I. Critique of Judge Marshall's Dissenting Opinion.

The dissenting opinion of Judge Marshall (92-13a of the Petition) is based upon a number of errors of fact and of reasoning:

1. Judge Marshall neglected the facts that Article 5 of the AFM Constitution, under which the Convention undertook to increase union dues and initiation fees, places final and effective decision for such increases in an overall Convention Committee and not in the *delegates* to the Convention; and that this in and of itself constitutes violation of Section 101(a)(3) of the LMRDA.

2. Judge Marshall *assumes*, without support in the record, that a relevant "weighted voting system appeared in many representative union constitutions prior to enactment" of LMRDA (Petition, p. 9a); and that the majority opinion below is inconsistent with all systems of weighted voting *by Locals*. Local unions which sent to Conventions greater or smaller numbers of delegates, *depending upon the sizes of their memberships*, exemplify a "weighted voting system" *by locals* which is *not* forbidden by Section 101(a)(3) of LMRDA, as construed by the majority below. According to Mr. George Meany's affidavit (110a-111a ¶4) "*most other international unions*" employ *such* a system of "weighted voting", by sending to a convention a "number of delegates * * * based on the number of members in the local" (110a-111a). Such a system is democratic and

representative. It avoids the concentration of power which results from granting to *a small number of delegates a large number of votes*, as happened in the AFM Convention (Proc.-pp. 30; 63) where *two delegates* from Local 802 cast 28,438 votes, upon the basis of their *own personal decision* as to *how* they should be cast and *without the knowledge* of the 28,438 members whom they purported to "represent". Neither the Local nor its membership received notice of RECOMMENDATION No. 11 or of the PROCEEDINGS at the Convention, until the Convention was over. Not only was no notice of RECOMMENDATION No. 11 sent to the *members;* no previous notice was sent to the *delegates* themselves, *except six hours prior to the midnight session at which* RECOMMENDATION No. 11 *was enacted* (93a-98a).

3. Contrary to the legislative history of LMRDA and without basis in the Record, Judge Marshall concludes that the statutory provision in question "was not brought about by any abuses found to have flourished under the *egis* of that [weighted voting] system". Judge Marshall also assumes that the National Legislature knew nothing about the "Report to the Fund for the Republic" (July, 1959) entitled "UNION CONSTITUTIONS", written by Leo Bromwich with assistance from the staff of the Institute of Industrial Relations, U. C. L. A. Under the heading, "Who Runs the Convention?", Mr. Bromwich writes (p. 11):

> "Of the [seventy] unions in the sample, thirty-three have a graduated scale of representation which tends to favor the smaller unit. * * * However, a number of the unions, among them some of the largest in the country, follow a different practice of allowing a permanent membership-delegate ratio regardless of whether the local unit is big or small * * *.

> "In addition, *most of the unions guard against the concentration of too much power in the hands of a single delegate* by specifying the maximum number of votes a delegate may have * * *." (emphasis added).

Judge Marshall relies on Leiserson's "American Trade Union Democracy", page 122. The quotation he makes in footnote 2 (Petition, p. 9a) merely states that "in *some* conventions" (emphasis added) the "full membership of each local union is voted by its representatives". In *most* unions, the quotation states, ambiguously, each local casts a "fixed number of votes *proportionate to its membership*". This last quoted sentence can mean exactly what Mr. George Meany says occurs "in most other international unions" (110a-111a "4) where delegates (and therefore votes) are proportionate to membership. This is permissible under the Act *as construed by the majority below*. Also, Judge Marshall omitted a significant final sentence from a paragraph which he quoted in footnote 2 (Petition p. 9a):

> "Often the elected delegates are *instructed by their locals how they should vote on certain issues*" (emphasis added).

No opportunity for this was allowed under the undemocratic and unrepresentative procedure used by the AFM Convention in question; because neither the delegates nor the members, prior to the Convention, had any notice whatever of RECOMMENDATION No. 11 or of the plans of AFM officers to increase dues and initiation fees behind the members' backs.

4. Judge Marshall failed to quote portions of Leiserson's book which support the view expressed by Mr. Meany (110a-111a):

"Every local union however small its membership is entitled to at least one Convention delegate • • •. Beyond the first delegate, *representation of local unions is usually in some proportion to their membership* • • •. Often also, a maximum number of delegates is fixed that no local may exceed • • •" (emphasis added; p. 128)

"• • • Although proxy voting is generally prohibited • • • every convention delegate casts not only his own vote, but a share of the voting strength of the union he represents as well • • •. The basis of representation and the methods of basing voting strength on size of local memberships differ among the unions, but three main types are recognizable in the constitutions.

"*The first is the most common. This .s both the number of delegates and the number of votes on the same specified number of members* so that both increase rapidly in proportion to membership increases • • • *This maximum is an incentive to add delegates as membership rises above a thousand* • • •.

"The second type holds down the number of delegates but grants additional votes in direct proportion to membership • • •.

"The third type increases both the number of delegates and the votes at a lessening rate as the membership increases • • •.

"All three types attempt to balance in some measure the representation of local government units and size of membership i.e. of small and large locals" (emphasis added).

Dr. Leiserson died (as the "Preface" states) in February, 1957, and his posthumous work was published in 1959 (the "Foreword" is dated January, 1959). No statistical details to support the ambiguous generalizations quoted above and the names and number of the unions studied are given.

5. Contrary to Judge Marshall's view (Petition pp. 9a; 13a) abuses in the conduct of Conventions did come to the attention of Congress:

(a) Robert F. Kennedy, then Counsel for the McClellan Committee, visited the writer of this Brief to obtain the record of a trial which upset a rigged convention of Joint Council 16 of the International Brotherhood of Teamsters in 1956 (*Lacey* v. *O'Rourke*, 147 F. Supp. 922); and the McClellan Committee gave two volumes of investigation to this case and its sequel. See Investigation of Improper Activities in the Labor or Management Field, "Hearings before The Select Committee" Part 11 and Part 12 (August 7, 8, 9, 12 and 13; July 1, August 14, 15, 16 and 19, 1957) for a detailed expose on a rigged convention of Joint Council 16 I. B. T.

(b) The McClellan Committee also carefully studied the rigged I. B. T. Convention at Miami Beach in 1957 which resulted in the election of Mr. Hoffa and other officers of the Teamster Union (*Cunningham* v. *English*, 269 F. 2d 517).

(c) Secretary of Labor James P. Mitchell testified at "Hearings (p. 257) before the Sub-committee of the Committee on Labor and Public Welfare, United States Senate, 86th Congress, First Session, on bills pertaining to Labor Management Reform" (out of which the LMRDA eventuated) about the rigged 1956 Convention of the Bakery and Confectionery Workers International Union, at which the President of that International had "railroaded through" changes in the Union constitution which destroyed remaining pretenses of union democracy. He also testified, using Reports of the McClellan Committee as his source, that Teamster officials crushed democracy within that Union's ranks by rigging elections among other things; and he referred to the then recent International Convention of the Teamsters in Miami, at which Mr. Hoffa

and his associates made a mockery of International Constitution by manipulating convention delegates (r. 257).

(d) Senate Report No. 1417, 85th Congress, Second Session, entitled "Interim Report of the Select Committee on Improper Activities in the Labor or Management Field" (p. 452) has this to say on the subject of industrial democracy:

> "The Committee recommends that legislation be enacted *assuring democratic procedures in labor unions.* In the Committee's opinion, legislation should be directed, thou[redacted]not limited, to three principal ends: 1. The periodic election of officers; 2. *The use of secret ballots in union elections and other vital decisions;* 3. A limitation on the right of internationals to place local unions in trusteeship or supervisorship. [Secret ballots are *not* weighted.]
>
> "*Much that is elicited in the Committee's findings of misconduct by union officials can be substantially improved, in the Committee's view, by a revitalization of the democratic processes of labor unions.* • • • While the Committee feels that the bulk of American unions operate fairly and democratically and agrees with the principle that the Federal Government should not interfere in a normal functioning, it is still of the opinion that certain basic standards of democratic porcedure should be established by law • • • " (emphasis added).

6. Apparently, Judge Marshall neglected to consider that there was no *democracy* nor real *representation* at the AFM Convention, where *two delegates* could and did *make up their own minds* (without consultation with anyone) as to how 28,438 votes should be cast. That procedure, so unrelated to the unknown wishes of the 28,438 members, was *assumed* to be both "representative" of members and

"democratic" by Judge Marshall. The members were as innocent as babes unborn of any knowledge of what was going forward at the Convention. It makes no sense to suggest that this "roll-call procedure" was democratic, or representative of the membership. The "roll-call" vote was simply a tally of the individual preferences of each unit of delegates, and not of the sentiments of the members at home. Individual delegates were rushed into deciding *for themselves*, at a midnight session, whether the total membership strength of their respective locals should be cast for "YES" or for "NO" or for some sort of split, without adequate notice or debate and without the slightest opportunity for instructions from the members they purported to "represent". The delegates of large Locals, especially if they struck up a combination with the Federation officials who were running the election, could under this procedure control the Convention and the other delegates. A relatively few of them, in combination, could readily take over the Convention. The fact that there were relatively few delegates with large voting power (only 111 delegates out of 1176 cast 121,180 votes out of 271,811) would provide the easy means and incentive to International officers to strike up alliances to control the Convention and would facilitate concentrations of power which are the very antithesis of "democratic" or "representative" union government (Proc. 7-30; 58-63).

7. Upon some undisclosed basis, Judge Marshall comes to the conclusion that "elimination of the weighted voting system was not consciously put forward as a goal of the Act" (Petition, p. 9a). What went on in the consciousness of the various legislators we have no way of knowing. But we do know, as even Judge Marshall admits, that the main thrust of LMRDA was "to correct the flagrant abuses of

power by some union officials which had been uncovered by extensive congressional investigations'' and to mandate adoption of *more democratic*, intra-union procedures. The procedure used at the AFM Convention lent itself to such *abuse of power* and to such *concentration of power* as negatived democratic and representative government. Thus, the indisputable purpose of the LMRDA, as set forth in its legislative history, in the legislative documents and in court commentary, commends use of the ''plain meaning'' rule as employed by the majority below.

8. Judge Marshall argues (Petition, p. 10a): ''Nor does any reason readily suggest itself for barring the weighted ballot system in connection with dues increases voted at union conventions * * *.'' Respondent's Brief in the Court below *suggested* a number of these reasons in the following language (pp. 25-27):

> ''* * * Appellants gave *control* over dues increases to a powerful Convention Committee, and not to *members or delegates*. They created class distinctions among delegates. Some are more powerful than others. Some have more votes than others. They are the ones to be cultivated or courted by union officers. The delegates had no real opportunity, under this method of 'representation', to discuss the matter with other delegates. Before they came to the Convention, the delegates never heard about the complex Recommendations numbered 2 and 11.
>
> ''The roll-call vote had no connection whatever, by way of 'reason' 'representation' or otherwise, with the strength of local memberships *except* that the delegates were able to *magnify* their own *individual* choices by weighting them with all or part of the membership strengths of Locals. * * * The vote which passed RECOMMENDATION No. 11 constituted union replacement of a Congressional rule calling

for a 'majority vote of the delegates voting at the convention'.

"The method of voting which passed RECOMMENDATION No. 11 actually presupposes a series of impromptu, intra-delegation decisions *by the uninformed delegates* in a midnight session. These decisions were a necessary prelude to the casting of 'membership' votes. The delegates themselves made up their own minds and expressed their own predilections. On that basis *they* cast not their own, but their *Locals' weighted votes.* Each individual delegate had first to decide *for himself* (a) whether the vote was to be split; (b) how it was to be split; and (c) whether to vote 'YES' or 'No'. The members were forgotten men. • • •

"Prior to the Convention and, indeed, prior to the Evening Session, no convention rule and no provision of union law required these intra-delegational, personal decisions to be made by the individual delegates upon the basis of consistent policy. How the membership-weighted votes were cast for the various Locals participating in the roll-call depended entirely upon the subjective, undisclosed preferences of the individual, *voting delegates.* • • • The tally shows the ballots of *locals* and not the ballots *of delegates.*"

Another reason is forcefully given by the "PROCEEDINGS OF THE THIRTY-NINTH ANNUAL CONVENTION" of the AFM (in 1934) in the following excerpt from the Report of the then AFM President, J. Weber:

"As to the mode of voting at Conventions, in answer to the misleading statement of McCann concerning same, I made the following explanation to the Senate Committee: "• • • locals having more than 300 members have one additional vote for each 100 members up to 1000. However, no local can cast more than 10 votes. The vast majority have

> only 1 or 2, * * *. This setup is necessary for the reason that New York and about twenty other unions in large cities, with their thousands of members, *a relatively small number of local unions, could control the entire organization composed of over 700 locals. The result would be disintegration of the organization. This is exactly what happened to the first organization of musicians, the National League. A few large locals dominated it and as a result it fell by the wayside*" (pp. 60-61; emphasis added).

9. Judge Marshall opines " * * * that, with regard to election of officers, and indeed, any other action taken at these conventions, the system is perfectly acceptable" (Petition, p. 10a).

In the first place, the provisions of Title IV of the LMRDA, not Title I, govern elections of union *officers*. In the second place, elections *of officers* take place only after necessarily well publicized nominations. The very fact of formal or informal nomination, long before the date of elections, constitutes adequate previous notice of what is at stake for the members and the locals. Even where, as is usual, union incumbents are renominated, the *fact that they will be renominated* is well known to all realistic, rank-and-file members not only months, but often years, before the next election. That officers or candidates will run for office cannot possibly be hidden from the members. No one even tries to hide it. On the contrary, candidates always publicize the fact of their candidacies. By contrast, if the purpose is to avoid furtive, autocratic control (such as was exercised by a few AFM officers at the Convention) of dues, initiation fees and assessments, the "weighted-ballot" system which Judge Marshall advocates and which the AFM Convention exemplified is not "perfectly acceptable", because it is the very antithesis of genuinely *demo-*

cratic procedure. It lends itself to easy manipulation by a relative handful of union officers allied with powerful union delegates.

Most of the delegates voted against RECOMMENDATION No. 11 (103a; Proc. 7-30; 58-63). Out of more than 605 Locals (Proc. p. 30), only 4 have more than 5,000 members each. These 4 Locals control 60,394 votes by means of a maximum of 12 delegates. (Sometimes one or two of three delegates may be absent; so that the remaining two delegates or one delegate would cast the entire vote for the Local.)

Only 11 AFM Locals (in addition to the 4 just mentioned), with a maximum of 33 delegates, have more than 2,000 members. This means that under the "roll call" procedure forty-five delegates, at most, can cast 91,687 votes. In addition to the 15 Locals just referred to, only 22 AFM Locals have 1,000 or more members, whose membership-strength is wielded by 66 delegates.

All this means that 111 delegates from as few as 37 AFM Locals out of 675 Locals (46a ¶3) cast 121,180 ballots (out of a total of 271,811 ballots) under Petitioners' "democratic" voting system. For all practical purposes that puts control over a convention of 1,176 delegates into the hands of 111 delegates, who first decide *for themselves* and *without consultation with or notice to members* how they will vote and then *multiply* their mere 111 choices to get a product of 121,180 votes.

Congress, whose manifest intention was to put control of dues increases in the hands of the *members* or *delegates*, cannot be assumed (against the mandate of the "plain language" of the statute) to have intended approval of such a blatantly undemocratic arrangement, which gives control over a Convention of 1176 delegates to about one-tenth of the delegates.

10. Thus we are *not* left, as Judge Marshall suggests (Petition, p. 10a) with the "plain meaning" rule as "the only basis for the majority decision." We have, in addition to the foregoing considerations: the general *purpose of the Landrum-Griffin Act*, the specific purpose of Congress to vest control over dues increases in the *members* or their *delegates*, the patently *undemocratic* and *unrepresentative character of the weighted voting* method, the *legislative history*, the *legislative documents*, and the AFM provision which places control over dues increases in the powerful Convention Committee (AFM Constitution Article 5) in actual and convenient alliance with a relatively small number of delegates, whose *personal* vote is magnified beyond recognition by the heavy weighting of their Locals' members.

11. As Judge Marshall points out, the statutory language reads: "majority vote of the delegates voting", and not "vote of a majority of the delegates voting". But it is also true that the vote-tally at the Sixty-Sixth Convention did not reflect a majority vote of the *delegates* who voted at the Convention. In no honest sense can it be said that it was the vote of the *delegates* which was *counted*. It was the *membership* vote which was tallied. The statute required that the vote be a *majority* vote and that the vote be a *delegate* vote. The *delegates* are supposed to be the "representatives" of the *members*. Not the members, but the delegates alone, were supposed to vote at the Convention.

Moreover in sub-paragraphs "A" and "B" of Section 101(a)(3) of the LMRDA, the phrase "majority vote" is used *five different* times in the same way and with the same meaning:

> (1) *(A)(i)* "*by majority vote*, by secret ballot, of the members in good standing."

(2) *(A)(ii)* "*by majority vote* of the members in good standing."

(3) *(B)(i)* "*by majority vote* of the delegates."

(4) *(B)(ii)* "*by majority vote* of the members in good standing."

(5) *(B)(iii)* "*by majority vote* of the members of the executive board." (emphasis added)

In each of these cases, the words "majority vote" mean the same thing: *Noscitur a sociis.* If Congress intended something else, it could easily have said so.

12. Despite this, Judge Marshall asserts that the phrase "majority of the delegates voting" is susceptible of "the interpretation, perhaps not without some strain, that delegates may have differing voting strength, depending upon the size of the locals which they represent." (Petition, p. 10a.) Thus the judge concedes that only a strained interpretation yields the meaning that *delegates* (as distinguished from the *locals*) may have differing voting strength, depending upon the size of the locals. Locals or *delegations* (not delegates) *may* lawfully have different voting strengths in proportion to the memberships of the particular Locals. That is the form of proportional representation which Mr. George Meany's affidavit (110a-111a) indicates is the most common method of voting at international conventions. In the context, there is no more reason why "majority vote of the delegates voting" should be construed to endow delegates with weighted votes than there is for assuming that "majority vote of the members in good standing" or "majority vote of the members of the executive board" means weighted votes for such members.

13. Judge Marshall seems to think that there are "compelling reasons to give such interpretation and none to

give the more apparent one". (Petition, p. 10a.) The situation is, in fact, precisely the opposite of what Judge Marshall says. There are many compelling reasons to give the words of the statute their *plain meaning:*

(a) The *purpose of the LMRDA* to mandate democratic procedures;

(b) The *purpose of Section 101(a)(3) to take away from labor union leaders the power to increase union dues*, assessments and initiation fees;

(c) The *purpose of that Section to vest control over increases in union dues, assessments and initiation fees in the members or in the delegates* elected by secret ballot to represent the members;

(d) The fact that, if Congress had intended to authorize weighted voting by individual delegates and to burden delegates with class distinctions, Congress could easily have said so.

(e) The fact that the roll-call vote actually employed by the AFM Convention was nothing but a pious facade, contradicting the very meaning of "representation" and "delegate" and made to resemble *in mere words* membership participation, whereas in fact it was a ploy utterly devoid of genuine membership participation of any kind.

(f) The very notion of a "convention" as an assembly of peers, who debate and consider matters on an equal footing and on the basis of *truth* and *logic, not power*, a notion which the National Legislature certainly favored, if the legislative history is any index.

(g) The fact that the plain meaning of the statute was not disputed during the lengthy and intensive scrutiny given by organized labor and others to proposals for labor reform legislation at the time is proof of the fact that Congress had a right to conclude that its plain words and their plain meaning raised no

issues from those who were not hesitant to raise numerous, even captious, issues with respect to other matters. In this respect, Judge Marshall (Petition, p. 13a) admits that the Act was submitted to multitudinous criticisms which never raised the problem here involved. This simply proves that (a) the plain meaning of the statute was not regarded as being in conflict with the majority operations of labor unions in the United States; and (b) the "plain meaning" here does *not* lead to "incongruous and even unjust results," as Judge Marshall suggests (Petition pp. 10a-11a). The cases cited by Judge Marshall in this respect concern, by contrast, really incongruous and unjust results which militated against employment of the "plain meaning" rule.

14. Judge Marshall's quotation (Petition, p. 11a) of remarks by Senator McClellan about increases of initiation fees simply confirms what Respondent affirms in this Brief. So does Judge Marshall's statement (Petition, p. 12a):

> "The purpose of the section was expressed in various ways, but emphasis was always placed on ensuring members the 'right to participate in deciding upon rates of dues' * * *".

It is sheer travesty to suggest that the *members* in this case participated in deciding upon the rates of dues rammed through the Sixty-Sixth Convention, when (a) they knew nothing whatever about RECOMMENDATION No. 11 until the Convention was over; (b) their so-called representatives, the delegates at the Convention, themselves first learned about the matter only six hours before the midnight session which was asked to enact it; (c) debate on the subject was limited to 15 delegates out of more than eleven hundred; and (d) out of the fifteen delegates allowed to discuss this most important matter, nine were hand-picked by the AFM

President (who wanted RECOMMENDATION No. 11 passed) as members of the Convention Committees which operated the Convention. It would seem that Judge Marshall has permitted conceptualism to turn his gaze from the facts in this case to abstractions. On that basis, he legislates and *repeals*, instead of construing. Congress, as he says, intended "merely to assure that dues increases could not be imposed by irresponsible or arbitrary labor union leaders not answerable in any way to the membership at large" (Petition, p. 13a). But RECOMMENDATION No. 11 was railroaded through the AFM Convention, and dues increases were thereby imposed, by "irresponsible and arbitrary union leaders" who had ample opportunity to notify the membership months before the Convention but who, desiring not to be "answerable in any way to the membership at large", kept the matter a secret until six hours before the midnight session (93a-98a).

15. Judge Marshall conjures up a horrendous spectacle of 14,000 delegates (at $300 a delegate, the expense would be $5,200,000) called to a convention by an international organization of 280,000 members! (Petition, p. 13a). Apparently, he arrived at this absurd total of 14,000 delegates by dividing the total membership of the Federation (which approximates 280,000) by twenty, the membership of the smallest AFM Local (No. 629 of Waupaca, Wisconsin)! Locals of the Federation of 150 members *or less* are entitled *to one delegate* (AFM Const., Art. 5). Therefore, Judge Marshall should have divided the 280,000 figure by 150 not by 20. The quotient would have been about 1,866 (rather than 14,000). A *reasonable ratio of delegates to members* would produce an arithmetic less perturbing than Judge Marshall's frightening but unrealistic figure of 14,000. By using a prudent ratio of one delegate for

each unit of 250 members after the initial 150, the number of delegates would be about the same as the number attending the Sixty-Sixth Convention!

16. Nor is there anything in the record that justifies Judge Marshall's conclusion that the method used at the AFM Convention was a "perfectly normal and accepted means of voting at union conventions." If Congress needed any evidence of abuses clamoring for the construction placed upon the statute by the majority below, the manner of conducting the Sixty-Sixth Convention would supply that need.

II. Critique of Petitioners' reasons for granting the writ, insofar as those reasons have not already been dealt with in this Brief by way of the foregoing critique of Judge Marshall's dissenting opinion.

17. The *dictum* in the majority opinion (Petition, p. 10) to the effect that the invalidated weighted voting system "is a method of voting widely recognized as fair and proper by a number of unions * * *" finds no support in the record; nor even in Dr. Leiserson's posthumous study. Mr. George Meany's affidavit contradicts (¶4, 110a-111a) the conclusion that the invalidated method is "widely" used; and common sense reveals that the method actually used by Petitioner in its Convention was neither fair nor representative.

18. It is not true that the effect of the majority decision below is (Petition, p. 11) to require many international unions ("if they are ever to raise their dues again") "to replace more democratic with less democratic voting procedures" (Petition, p. 11). The interpretation made by the majority suggests the really democratic and representative

expedient of *increasing the number of delegates according to some sensible ratio* (see Section 15, *supra*) so that the large unions will have more *delegates* than the small unions. On its face, this is better than concentrating too much voting power in a few delegates. This is a method used by "most other international unions", according to Mr. Meany (110a-111a).

19. What Petitioners call (Petition, p. 11) the "wholesome principle of equal membership representation" as exemplified by the Sixty-Sixth Convention is actually a fraud on the membership. It verbally pretends to some relationship with *membership* wishes. At the same time, it actually conceals from the members any advance knowledge of the principal business of the Convention; so as to prevent the members, in the home Locals, from consulting with, and from instructing, their delegates *upon the basis of majority votes cast by the members, at their own Local union halls.*

20. Nor is it true, as Petitioners suggest (Petition, p. 11), that, under the majority opinion below, the AFM (or other internationals) would have to so increase the delegate strength of the larger locals as to make the holding of a convention exorbitantly expensive, if not physically impossible (see Section 15, *supra*). Only a union administration daft enough to require one delegate for every 20 members would, in an organization of 280,000 members, invite 14,000 delegates to an annual convention at a cost of $5,200,000, which is three times more than their annual income! If, by contrast, every Local with 150 members or less is entitled to one delegate (as the AFM Constitution requires); and if, thereafter, a Local had one additional delegate for each unit of 250 additional members (or a major fraction

thereof), the number of delegates would not exceed the precise number of delegates attending the Sixty-Sixth Annual Convention.

21. The Petition (p 12) refers to "the number of international unions affected and the fact that these unions periodically hold union conventions at which the question of raising dues can arise * * *," as if there were evidence in the record that other unions operate their conventions as did the AFM. Few, if any, international unions conduct conventions in the ram-rod manner of the AFM Convention, where RECOMMENDATION No. 11 was pushed through the Convention without previous notice to the Locals, to the members or to the delegates. If, indeed, there be such other internationals, the majority decision below is a wholesome remedy, banning undemocratic and unrepresentative processing of important pieces of union legislation.

22. The Petition (p 13) asks whether Congress has the power, to set aside a "rule of self-government that in the words of the Court below, is 'the most democratic method * * *, which harms no one and which has not been found to be the subject of any abuse'"? The Sixty-Sixth Convention was no act of *self-government* by either *members* or *delegates*. The invalidated method would be a democratic method, only *if it were preceded by votes of the home Locals instructing the delegates as to the position they should take at the Convention with respect to Recommendation No. 11.*

23. It is simply untrue that the "weighted method" of balloting used at the Convention "is to all appearances the most 'democratic' method in the sense that each member is duly represented" (Petition, p. 14). That is a purely

conceptualistic view, having nothing whatever to do with the realities of the Convention, where no member was *represented* in any genuine sense. No member's views on the *Recommendation* were considered by the delegates (who cast weighted ballots *according to their own personal views.* and not according to the wishes of members by whose number they ballasted their *own* wishes). The members could have no views on subjects of which they were utterly ignorant.

24. The decision below does not deny *equality of representation to the members* (Petition, p. 15). But it does deny *inequality of voting to the delegates.* The *members* at the home locals have *equality of representation when, by secret balloting, they elected their delegates.* From then on decision was in the hands of the *delegates,* under the statutory scheme of things. The manner in which the Convention was conducted repudiated that statutory scheme and destroyed equality of delegates (as union members). Section 101(a)(1) required:

> "Every *member* of a labor organization [surely this includes *delegates* who are all *members* of the AFM] shall have *equal rights and privileges within such organization* • • • *to vote in elections* or referendums of the labor organization, • • • *and to participate in the deliberations and voting upon the business of* • • • [union] *meetings,* subject to reasonable rules and regulations in such organizations' Constitution and By-laws" (emphasis added).

25. Likewise, when Petitioners limited debate on the most important question which ever confronted an AFM Convention to speeches by 15 delegates at a midnight session and that nine of the fifteen were delegates who had been chosen by AFM President Kenin for membership on

Convention Committees, there was a clear violation of Section 101(a)(2). Delegates, who are all AFM members, were denied a right "to express at meetings of the labor organization * * * views * * * upon * * * business properly before the meeting [Convention]"

26. The Court below did not, as the Petition (p. 15) suggests, read Section 101(a) (3) (B) (i) without considering Section 101(a) (1). In fact, the ruling of the majority below is the only ruling that could give consistent effect to the language of both sections.

27. It is significant that, as Petition admits (Petition, p. 16), AFL-CIO President Meany testified at a Hearing before a Joint Committee of the House: "Section 101(a) (3) actually permits changes in dues * * * by every method which unions *generally* employ, *except* action by a general Executive Board or similar body" (emphasis added). In other words, Mr. Meany had only one criticism of section 101(a), because it embodied what unions *generally* had been doing. The Act was changed (to meet Mr. Meany's criticism) to allow constitutionally authorized executive-board action. Presumably, President Meany had no further criticism of section 101(a) thereafter; especially since it clearly means what the majority opinion below says it means; and on this even the dissenting Judge agrees.

28. Against the background provided by the foregoing paragraph, it is strange to read on page 16 of the Petition: "The courts should not attribute to Congress a silent intent to outlaw a historic and concededly democratic practice of a substantial portion of the labor movement." The lower Court attributed to Congress only the intention which is clearly explicated in the very language used by Congress.

Mr. Meany knew better than anyone else what was *historic* in a *substantial portion* of the labor movement. In his testimony before the Joint Sub-committee of the House, which considered 101(a) (3), he found no fault with that section as a violation in the respect of the practice of a *substantial portion* of the labor movement. His affidavit (110a-111a) in the instant case clearly shows that *most other unions* elect larger or smaller numbers of *delegates* to conventions in proportion to their membership. They weigh in proportion to membership, by increasing the delegation and not the votes of the delegates.

29. The fact that the Barden Bill and the McClellan Bill (and any other bill), *formally rejected by Congress*, called for a vote which was *numerically equivalent* to the number of members in the constituent units proves nothing. Senator McClellan and Congressman Barden eventually voted for the Landrum-Griffin Bill. This shows that eventually they *changed their minds*. Nor does it matter *why* the Barden Bill and the McClellan Bill were rejected by Congress. The significant point is that Congress enacted the Landrum-Griffin Bill. Therefore, Petitioners' speculation (Petition, p. 19) to the effect that these bills were rejected, not because Congress was opposed to weighted voting, but because it was unwilling to restrict unions in formulating voting procedures is irrelevant. The Landrum-Griffin Act is replete with restrictions on union voting procedures. Indeed, so thorough-going was Congressional regulation of union voting procedures that practically every important union in the United States had to change its Constitution and By-laws as a result of the passage of the Landrum-Griffin Act.

30. The argument by which Petitioners (Petition, p. 20) seek to bolster their contentions by means of the First

Amendment is so artificial and so unsupported by the cited cases that it deserves no extended comment. If the right to form labor organizations "must necessarily encompass the right of the members to determine the form which such organizations will take and particularly the basis on which the wishes of the members are to become union law" (Petition, p. 21), then most of the Federal Labor Relations Laws should be repealed or modified. It is bald abracadabra to talk of the right of *members* of an organization to allocate voting strength in this context, since it was a minority of the delegates personally, and not the members, who allocated the membership votes (Proc. 7-30; 58-63).

POINT II.

The Sixty-Sixth Annual AFM Convention increased Union dues and initiation fees in violation of Section 101(a)(3), Title I, of LMRDA.

A. Article 5 of the AFM Constitution, under which the AFM Convention undertook to increase Union dues and initiation fees, places final and effective decision for such increases in an overall Convention Committee and not in the delegates to the Convention, as the statute requires in the circumstances. RECOMMENDATION No. 11, as its text shows, did purport to increase (a) the "Federation Initiation Fees," (b) the "Local regular periodic dues" and (c) the "Federation Per Capita Dues" (Proc. 54-55).

The language of the LMRDA supports the interpretation of Section 101(a)(3)(B)(i) made by the Court below. The phrase under consideration is: "majority vote of the delegates voting at a regular convention." Here the noun, "vote," is not only modified by the word, "majority," (which is used adjectively) but also by the prepositional, adjectival phrase: "of the delegates voting at a regular

convention." It is not just the vote of an undisclosed "majority"; it is the vote "of the delegates voting" at the Convention. Even if one assumes that the single word, "majority," does not mean a majority *of the delegates* but rather a majority *of the votes*, the prepositional, adjectival phrase, "of the delegates," clearly modifies and characterizes the word, "vote." The vote belongs to the delegates. It is a vote "of the delegates voting," who must be in the majority to increase dues and initiation fees in a lawful manner.

The meaning given to this language by Appellants would turn the very weapon, which Congress gave to rank-and-file members for protection against union officers seeking to increase dues and initiation fees, against such members. Delegates whose voting power is magnified or multiplied by factors equal to the number of members in large locals would enjoy a strength and influence not owned by delegates from small locals. Such "strong" delegates, allied with the incumbents, could easily control conventions and dues increases. They could defeat control by the membership. A relatively few of them could take over a convention. The preposition, "of," in the phrase, "of the delegates," is indicative of possession by all the delegates. The vote at the AFM Convention was not just a "vote of the delegates". The LMRDA gives delegates "*voting at a regular convention*" or the members control over dues increases. Even Appellants' Brief (p. 12) admits that the word, "vote," clearly refers to a delegate vote . . ." (emphasis added). The roll-call vote procedure employed for the purpose of increasing membership dues and initiation fees was not based upon the "majority vote of the delegates voting at a regular convention" (emphasis added).

Congressional debates on the Landrum-Griffin Act as well as relevant Congressional Reports prove that the

chief purpose of Congress in passing this legislation (134a-138a) was to take from union officers, who had frequently abused the power in the past, the right to increase dues and initiation fees. (H. Rep. No. 741 on H. R. 8342, pp. 7-9, 81-82, 29-30; Conference Report (H. Rep. No. 1147) on S. 1555, p. 31; Senate Report No. 187 on S. 1555, pp. 2-10-70-72).

Article 5 (AFM Constitution) in effect calls for balloting by *Locals* not by delegates. The Act calls for a majority vote of the delegates. Title I calls for *equal* votes; since the delegates are members. The AFM Constitution gives delegates unequal voting power and thereby creates a class of powerful delegates and intra-convention discriminations which lend to the machinations of the "smoke-filled room", to intra-union political alliances and to concentration of union power in few hands.

Mathematically, a majority of the delegates at the Sixty-Sixth Convention voted against Recommendation No. 11 (Proc. 58-63). Only if the "vote of the delegates" is transmuted, multiplied or otherwise manipulated by some system of membership or other weighting (so that it is no longer recognizable as *votes of the delegates*) is it possible to say that the Sixty-Sixth Annual Convention "enacted" Recommendation No. 11. The statutory words, "a majority vote of the delegates", do not, under any fair construction, mean a system of weighted voting whereby each local casts "as many votes as it has members as per the Treasurer's book" and whereby the vote "of the delegates" is modified or masqueraded so that, because of the membership weightings, it can no longer be regarded as a vote of the delegates. The fact that unions must change their By-laws to accommodate to the Act does not alter the Congressional mandate. Scarcely a union, existing then and now, escaped that obligation in the past.

POINT III.

AFM officers in conducting the evening session which enacted Recommendation No. 11 violated their fiduciary responsibilities under Section 501(a) of the LMRDA, by disregard of the AFM Constitution and By-laws and by the manner in which they railroaded the Recommendation through the Convention. This appears from the *"Official Proceedings"* of the Convention. Therefore the result effected by the decision on appeal is just and valid, even if Petitioners' interpretation of Section 101(a)(3) of the Act were correct.

Respondent, according to the cases, has a right to urge any argument in support of the judgment below, including contentions not passed on by the Court below, and even contentions rejected by it: *Langnes* v. *Green*, 282 U. S. 531, 535-539; *Walling* v. *General Industries Co.*, 330 U. S. 545-547; *United States* v. *Ballard*, 322 U. S. 78, 88.

The facts demonstrating violation of *fiduciary responsibility* by AFM officers at and before the Convention in June, 1963 loom large in the record and occupy most of its pages. The District Court had at least pendent jurisdiction over all these matters; which the District Court did not explore, in view of the rationale of its *partial* summary judgment herein.

Title V of the LMRDA is entitled "SAFEGUARDS FOR LABOR ORGANIZATIONS." To Section 501 itself thereof, Congress gave the following title: "FIDUCIARY RESPONSIBILITY OF OFFICERS OF LABOR ORGANIZATIONS." The first sentence of §501(a) reads: "The officers, agents, shop stewards and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." See *Holderman* v. *Sheldon*, 204 F. Supp.,

890, affirmed 311 F. 2d 2; *Nelson* v. *Johnson*, 212 F. Supp. 283, affirmed ..... F. 2d .....; *Brooks* v. *Local 30*, 187 F. Supp. 365 (134a-136a).

It is manifestly a violation of fiduciary duty under §501(a) of the LMRDA for incumbent union officers, in arranging and influencing balloting on controversial subjects for their own purposes, to fail to comply with material and significant provisions of the union's constitution and By-laws; and to resort to the devices and strategems revealed by the record.

Petitioners' officers literally "railroaded" Recommendation No. 11 through the Convention (11a-98a) in utter disregard of the rights of members, Locals and delegates under relevant and important provisions of the AFM Constitution and By-laws, as hereinafter shown on the basis of Petitioners' own documents:

(1) The evening session was chaired by Appellant's President (who is an attorney). The record shows (34b-35b) that not one but two voice votes were called for by the Chair. Admittedly, the Chair ruled, with respect to the two voice votes, that the 'ayes" and the "nays" were of "equal response" (Proc. 58). This ruling, *ipso facto* and immediately, required application of Robert's "Rules of Order" calling for a rising vote; since no provision of the AFM Constitution or By-laws supplies a relevant rule or regulation and since Article 28, Section 2, of AFM By-laws expressly provides that Robert's Revised Manual "shall be the guide unless otherwise provided." Petitioners admitted that the Chairman did not follow the procedures prescribed by Robert's Rules of Order and AFM By-laws (30b). The Chairman himself immediately cued the roll-call vote (115a); and without pause recognized Delegate Snider, who took the cue and called for a roll-call under Article 5 of the AFM Constitution (115a).

(2) Article 5 of the AFM Constitution was itself violated: since *five Locals did not demand the roll-call vote.* Article 6, Section 2, of the AFM Constitution provides: "No member shall be permitted *to represent more than one local*, nor shall any member be permitted to act as delegate for a local *unless he is a full member in good standing in said local*" (emphasis added) (115a).

Petitioners' claim that five locals demanded a roll-call vote finds no support in the record. After saying that "any ten delegates or five locals may ask for a roll-call vote, if you are dissatisfied with the voice vote", the Chair (115a) immediately recognized delegate Snider and identified the microphone he could use. Thereupon, Mr. Snider spoke:

> "Merle Snider, Local 368, Reno, Nevada. I call for a roll-call vote. * * * I have five locals, which is required by the Constitution to ask for a roll-call vote. This will be verified by the Chair" (115a).

The Chair did not verify it. No delegates from the Locals, which Mr. Snider said he "had", rose to indicate that they had demanded a roll-call vote. Section 2, Article 6, of the AFM Constitution forbade Snider from speaking for any Local except his own. How did Mr. Snider, in the instant between (115a) the Chairman's statement (to the effect that any ten delegates or five locals could ask for a roll-call vote if "dissatisfied with the voice vote") and the Chair's recognition (115a) of Snider, have time to solicit and obtain authorizations to speak for five locals beside his own? The Chair had no reason whatever to assume, as it did (116a), that five locals had demanded a roll-call vote.

(3) The Chairman deliberately misrepresented both fact and By-law in remarks leading to or cuing the roll-call vote. Thus, he violated his duty, as trustee, to make full and

honest disclosure (115a). A delegate had risen a moment before and had said to the Chairman:

> "* * * it seems to me that a matter of such great importance as this to be placed in a voice vote is ridiculous, because it's going to be a matter of who out-yells whom. I think we should set the machinery in motion tonight or tomorrow morning for a ballot vote. This will give us the only real decision" (115a).

To this, the Chairman dishonestly replied:

> "Well, a roll-call vote is what you are referring to. Any ten delegates or five locals may ask for a roll-call vote if you are dissatisfied with the voice vote" (emphasis added).

The Chairman misrepresented in two respects. The delegate was not referring to a "roll-call vote"; he was quite obviously referring to a paper ballot vote, such as is commonly used in most union conventions. The delegate was correct in stating that only such a ballot vote would give a "real decision", in default of a rising vote and count. The Chairman was also misrepresenting when he stated that a roll-call vote could be called for after a voice vote (without a motion to reconsider), if the delegates were "dissatisfied with the voice vote." There was no basis for such a statement in the AFM Constitution and By-laws or in Robert's Rules of Order.

(4) Neither the delegates nor the other members (74a-93a) of the AFM and its Locals had ever been properly informed about the significance of the decision of the Court of Appeals rendered April 30, 1963 in the *Cutler* case (316 F. 2d 546) which created the problem the Convention was asked to solve. Indeed, the "Official Proceedings" demonstrate that, in violation of their fiduciary responsibility

under Section 501(a) of the Act, AFM officers suppressed information needed for intelligent consideration of RECOMMENDATION No. 11 (Proc. 107-112). For example, Kenin's letter of May 7, 1963, sent to all members, delegates, locals and officers shows that, instead of enlightening the delegates and members on the problem confronting them, he actually misinformed them (Proc. 88; 107-112; 74a-84a).

(5) In compiling the tally of the voting on RECOMMENDATION No. 11, the Convention improperly counted at least 26,174 votes *more than once* (73a-73b; 46a; 109a; 2b-7b; 12b-22b). The roll-call required by Article 5 of the AFM Constitution enabled the voting Locals to cast as many ballots as they have members. Thousands of members of the AFM belong to more than one Local as Petitioners admit (46a; 109a). Necessarily members thus belonging to more than one Local were counted more than once (33a ¶39-40).

(6) The "Official Proceedings" (Proc. 58-63) demonstrate by the tally of "YES" votes and "NO" votes ascribed to the various AFM Locals, that twenty-two Locals with 15,066 members improperly split their vote upon varying rationales. Neither the LMRDA nor the AFM Constitution or By-laws permit such splitting of votes. It is impossible to discover a rational explanation for some of the splittings. For example, Local 204 has a membership of 541 (Proc. 15). It was represented by three delegates (Proc. 15). In the vote on RECOMMENDATION No. 11 it cast *one* ballot for "YES" and *540* "NO" (Proc. 60).

(7) AFM officers also violated their fiduciary duties under Section 501(a) of the Act by failing to enforce Article 28, Section 21 of the AFM By-laws reading:

> "No alteration or amendment to the Constitution or By-laws (except as otherwise provided in the By-laws or ordered by a Convention) shall be made

> unless proposed in writing, *and said alterations or amendments must receive the majority vote of the delegates present* to become a law, unless otherwise provided" (emphasis added).

RECOMMENDATION No. 11 did not receive the majority vote of the "delegates present" (Proc. 58-63). Some 373 delegates voted "YES". According to the AFM, 1,176 delegates were *present* at the Convention during the vote on RECOMMENDATION No. 11 (48a). One-half of 1,176 is 588. Thus, less than one-half the delegates voted for RECOMMENDATION No. 11. Incidentally the language used in Article 28, Section 21, has an almost one-for-one correspondence with the language used in Title I of the Statute; compare "majority vote of the delegates present" with "majority vote of the delegates voting."

Thus, the Petition should be denied for either of two reasons:

One. The Record shows, largely from Petitioners' own admissions, that violations of Section 501 of the LMRDA have totally invalidated RECOMMENDATION No. 11 (including, of course, the provisions thereof which purport to increase dues and initiation fees).

Two. The Petition is premature. Respondents should be allowed to try the remaining issues raised by the Complaint (40a-41a) respecting the many violations of Section 501 of the LMRDA *indicated*, if not *established*, in the Record. These issues should first be tried before presentation of formal briefs to this Court on the theory, plainly adopted by Petitioners and *amicus curiae*, that the instant case is a quasi-class action in its significance for many other labor unions. Actually, the case is unique by reason of the

numerous breaches of fiduciary duty which characterize it. Those breaches make it unnecessary to reach the other federal questions on which Petitioners rely.

Conclusion.

The Petition for certiorari should be denied.

Respectfully submitted,

GODFREY P. SCHMIDT,
Attorney for Respondents,
60 East 42 Street,
New York 17, N. Y.

MU 7-1950

Dated: New York, N. Y.
February 17, 1964

APPENDIX.

29 U. S. C. §501, Pub. Law 86-257; 73 Stat. 535.

TITLE V—SAFEGUARDS FOR LABOR ORGANIZATIONS

FIDUCIARY RESPONSIBILITY OF OFFICERS OF LABOR ORGANIZATIONS

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, *to hold its money and property solely for the benefit of the organization and its members* and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop

steward, or representative *in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.* No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.